

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAIME HERNANDEZ,

No. C 05-4364 WHA (PR)

Petitioner,

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

v.

MIKE EVANS, Warden,

Respondent.

**INTRODUCTION**

This is a federal habeas corpus action filed by a state prisoner pursuant to 28 U.S.C. 2254.

As grounds for habeas relief petitioner alleges, *inter alia*, that the trial court violated his due process rights by giving constitutionally flawed jury instructions. For the reasons set forth below, the petition is **DENIED**.

**STATEMENT**

In 2003, Petitioner was convicted by a Monterey County Superior Court jury of three counts of murder (Cal. Pen. Code § 187), and of enhancements for using a firearm in the commission of a felony and participation in a street gang (*id.* §§ 12022.53 & 186.22), enhancements which were attached to each count of murder. The trial court sentenced petitioner to a total term of 180 years to life in state prison. Petitioner appealed. The California Court of Appeal for the Sixth Appellate District affirmed the judgment (Ans., Ex. C (*People v. Hernandez*, No. H026408, 2004 WL 2958275

1 (Cal. Ct. App. Dec. 22, 2004)) at 1, 27).<sup>1</sup> The California Supreme Court denied his petition for  
2 review (Pet. at 4). It appears that petitioner did not file any state habeas petitions relating to the  
3 convictions at issue here.

4 Evidence presented at trial showed that during the afternoon of September 1, 2002, petitioner  
5 killed three persons who were members of a rival gang. At the time of the killings, petitioner was  
6 sixteen years old and a member of the Norteno street gang. Three days before the killings, on  
7 August 30, 2002, petitioner was shot by a person wearing blue, a color associated with the Surenos,  
8 a rival gang. The three men who were killed on September 1 were Surenos (Ans., Ex. C at 2).

9 As grounds for federal habeas relief, petitioner alleges that (1) the trial court's admission of  
10 irrelevant evidence that there was ammunition near petitioner's house violated his due process  
11 rights; (2) admission of an expert's testimony as to the ultimate issue of petitioner's mental state  
12 violated due process; (3) his due process rights were violated by the trial court's failure to instruct  
13 *sua sponte* on accomplice testimony; (4) his due process and confrontation rights were violated  
14 when the trial court instructed with CALJIC 2.11.5, regarding unprosecuted accomplices; (5) his  
15 due process rights were violated by the trial court's giving CALJIC 2.21.2, regarding rejection of  
16 testimony when part of it is false; (6) his due process rights were violated by the cumulative effect  
17 of the above errors; (7) the trial court's conclusion that it lacked the power to order a remand to  
18 juvenile court absent prosecutorial consent violated due process and the separation of powers  
19 doctrine; and (8) his trial and appellate counsels rendered ineffective assistance.

## 20 STANDARD OF REVIEW

21 Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, a district court may  
22 not grant a petition challenging a state conviction or sentence on the basis of a claim that was  
23 reviewed on the merits in state court unless the state court's adjudication of the claim:

24 (1) resulted in a decision that was contrary to, or involved an unreasonable  
25 application of, clearly established Federal law, as determined by the Supreme Court  
26 of the United States; or (2) resulted in a decision that was based on an  
unreasonable determination of the facts in light of the evidence presented in the  
State court proceeding.

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28 <sup>1</sup> Judges Mihara, Rushing, and Premo sat on the state appellate panel. The panel modified the judgment to reflect that petitioner had 343 days of actual credit and 343 days of total credit.

1 28 U.S.C. 2254(d).

2       The first prong applies both to questions of law and to mixed questions of law and fact.  
3 *Williams v. Taylor*, 529 U.S. 362, 407–09 (2001). The second prong applies to decisions based on  
4 factual determinations. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

5       A state court decision is “contrary to” Supreme Court authority, that is, falls under the first  
6 clause of Section 2254(d)(1), only if “the state court arrives at a conclusion opposite to that  
7 reached by [the Supreme] Court on a question of law or if the state court decides a case differently  
8 than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at  
9 412–13. A state court decision is an “unreasonable application of” Supreme Court authority, and  
10 thus falls under the second clause of Section 2254(d)(1), if it correctly identifies the governing  
11 legal principle from the Supreme Court’s decisions but “unreasonably applies that principle to the  
12 facts of the prisoner’s case.” *Id.* at 413. A federal court on habeas review may not issue a writ  
13 “simply because that court concludes in its independent judgment that the relevant state-court  
14 decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. Rather,  
15 the application must be “objectively unreasonable” to support granting the writ. *Id.* at 409.

16       Factual determinations by state courts are presumed correct absent clear and convincing  
17 evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not altered by the fact  
18 that the finding was made by a state court of appeal, rather than by a state trial court. *Sumner v.*  
19 *Mata*, 449 U.S. 539, 546–47 (1981). A petitioner must present clear and convincing evidence to  
20 overcome Section 2254(e)(1)’s presumption of correctness; conclusory assertions will not do.  
21 *Ibid.*

22       Under Section 2254(d)(2), a state court decision “based on a factual determination will not  
23 be overturned on factual grounds unless objectively unreasonable in light of the evidence  
24 presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340.

25       When there is no reasoned opinion from the highest state court to consider the petitioner’s  
26 claims, the court looks to the last reasoned opinion, in this case that of the California Court of  
27 Appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801–06 (1991).

28

**DISCUSSION****1. ADMISSION OF AMMUNITION EVIDENCE**

Petitioner claims that the trial court violated his rights when it admitted evidence that ammunition was found near his residence (Pet. at 10). The state appellate court rejected this claim, finding that the ammunition evidence was relevant and sufficiently probative (Ans., Ex. C at 13–14).

During a search of petitioner’s residence, police officers found a “corroded [unexpended] nine-millimeter ball bullet inside some plastic baggies . . . three to five feet from the backdoor of [petitioner’s] apartment.” This bullet “was the same common brand as one of the casings found at the [crime] scene” (*id.* at 9). At trial, defense counsel objected to the admission of the corroded bullet on the grounds that this evidence was irrelevant and that its prejudicial effect outweighed its probative evidentiary value. In response, the prosecutor made an offer of proof that the officer who found the bullet could testify to the circumstances of the bullet’s discovery, and that an expert could testify that the bullet casing that matched the unexpended, corroded bullet had been fired from the gun used to kill the victims. The trial court denied the defense’s motion, finding that the ammunition evidence was relevant, but that its evidentiary weight was for the jury to determine (*id.* at 12–13).

The admission of evidence, such as the ammunition, is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). Petitioner has not shown that a specific federal constitutional guarantee was violated, but rather bases his contention on a state rule of evidence. As to the question of the magnitude of the error, only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process such that petitioner was denied a fundamentally fair trial. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). The jury could make a permissible inference from the ammunition evidence.<sup>2</sup> Specifically, the presence

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<sup>2</sup> Petitioner also claims that the ammunition evidence constituted prior bad act or impermissible character evidence (Pet. at 9.) Petitioner’s claim is without merit. Even if the ammunition evidence constituted character evidence, the Supreme Court has left open the question of whether admission of

1 near petitioner's residence of ammunition similar to the type used in the killings could indicate  
2 that petitioner was involved in the shootings. Because such an inference is permissible, petitioner  
3 has not shown that the admission of the evidence resulted in a fundamentally unfair trial. Based  
4 on this reasoning, petitioner's claim is denied.

5 **2. ADMISSION OF EXPERT TESTIMONY**

6 Petitioner claims that the trial court violated his due process rights by allowing an expert to  
7 testify that the killings "were committed with the specific intent to further a gang." Petitioner  
8 contends that this testimonial evidence impermissibly offered an opinion as to the "ultimate  
9 question of a particular person's intent." Petitioner contends that this "authoritative-sounding"  
10 testimony "had a strong tendency to remove the intent questions from the jury" and lessened the  
11 state's burden of proof (Pet. at 13.) The state appellate court found that even if the trial court erred  
12 in admitting the testimony, such error was harmless "given the extensive admissible expert  
13 testimony that these *types* of gang-related retaliatory murders would have been committed to  
14 benefit the gang" (Ans., Ex. C at 15–16).

15 Petitioner's claim is foreclosed by case law. The Supreme Court has left open the question  
16 whether the Constitution is violated by the admission of expert testimony concerning an ultimate  
17 issue to be resolved by the trier of fact. *See Moses v. Payne*, 543 F.3d 1090, 1105 (9th Cir. 2008).  
18 Furthermore, the Ninth Circuit has declared that it is well-established that expert testimony on an  
19 ultimate issue is not per se improper. *Id.* at 1106. Because petitioner's claim is based on the  
20 opposite proposition, it necessarily fails. Petitioner's claim is denied.

21 **3. INSTRUCTION ON ACCOMPLICE TESTIMONY**

22 Petitioner claims that the trial court violated his right to due process by failing to instruct,  
23 *sua sponte*, that accomplice testimony should be viewed with caution, as set forth in CALJIC Nos.  
24 3.10–3.19 (Pet. at 16). The state appellate court found that under state law that any alleged error  
25 committed by the trial court was harmless (Ans., Ex. C at 16–17).

26  
27 propensity evidence violates due process. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991). Based on  
28 the Supreme Court's reservation of this issue as an "open question," the Ninth Circuit has held that a  
petitioner's due process right concerning the admission of propensity evidence is not clearly established  
as required by AEDPA. *Alberni v. McDaniel*, 458 F.3d 860, 866–67 (9th Cir. 2006).

1           The facts underlying petitioner's claim are as follows:

2           Norteno gang member Mateo Guerrero assisted police in retrieving the  
3           nine-millimeter gun used in the shooting . . . At trial, Mateo was in the Youth  
4           Authority pursuant to his admission that he was an accessory after the fact to the  
5           homicides. He testified he did not supply a gun to [petitioner], and he denied  
6           having heard any admissions from [petitioner]. Mateo previously had told police  
7           [petitioner] asked to use his gun after [petitioner] was shot [on August 30], that  
8           [petitioner] brought back the gun after the shooting [on September 1], that  
9           [petitioner] said he "had done something bad" and "needed to get rid of the gun,"  
10          and that [petitioner] admitted he "had done the shooting." Mateo gave conflicting  
11          statements regarding whether the gun had been loaded when he provided it to  
12          someone for [petitioner]; he alternatively said it was unloaded, it had four or five  
13          rounds in it, and it was fully loaded with eight rounds.

14          (Ans., Ex. C at 9).

15          CALJIC Nos. 3.10–3.19 give the legal meaning of "accomplice," (*id.* 3.10, 3.14–3.17),  
16          state that an accomplice's testimony must be corroborated by sufficient evidence (*id.* 3.11–3.13,  
17          3.19), and that an accomplice's testimony must be "viewed with care and caution" (*id.* 3.18).

18          A trial court's failure to give special instructions on accomplice testimony, which is  
19          "inevitably suspect" and unreliable," can be prejudicial error when that testimony is "important"  
20          to the case. *United States v. Bernard*, 625 F.2d 854, 857 (9th Cir. 1980) (citing *United States v.*  
21          *Davis*, 439 F.2d 1105 (9th Cir. 1971)). In *Davis*, the Ninth Circuit found prejudicial error because  
22          "the defendant's guilt rested almost entirely on the testimony of the accomplice, and the other  
23          evidence linking the defendant to the criminal activity was weak." *Bernard*, 625 F.2d at 857.

24          Under these legal principles, petitioner's claim is without merit. Specifically, petitioner's  
25          case is unlike that in *Davis* because his guilt did not rest "almost entirely" on Mateo's testimony,  
26          but rather on other significant evidence. One piece of such evidence was the proximity of the  
27          ammunition to petitioner's residence. Another is the testimony of Suzy Rios, a sort of foster  
28          mother to petitioner since he was twelve (Ans., Reporter's Transcript, Vol. 7 at 1680–81). Rios  
                testified at trial that petitioner said after he had been shot [on August 30] that he was going to get a  
                gun and "put in some work," a phrase that Rios defined as to "shoot somebody," or, more  
                generally, "to retaliate" (*id.* at 1688–89). According to her testimony, when Rios asked petitioner  
                whether he was involved in the September 1st shootings, he "just put his head down" (*id.* at 1696).  
                Rios testified that on another occasion, she told petitioner that he had killed three people, to which

1 petitioner responded that he “couldn’t believe it” (*id.* at 1711). According to her testimony, Rios  
2 later told her husband and the police that petitioner had admitted that he was responsible for the  
3 shootings (*id.* at 1736–1737). Further evidence of petitioner’s guilt came from Rios’s daughter,  
4 Letitia, who testified at trial that petitioner had admitted to her that he was responsible for the  
5 shootings, and added, “I fucked up” (*id.*, Vol. 8 at 1805). Also, one of the victims made a dying  
6 declaration that petitioner was responsible for the shootings (*id.*, Ex. C at 10). Finally, the parties  
7 stipulated that Laura Cabrera, who had been incarcerated with petitioner in juvenile hall after the  
8 killings, told a defense investigator that petitioner had spoken to her about the homicides.  
9 According to the stipulation, petitioner told Cabrera that he was sorry for what happened, and had  
10 asked Cabrera to give a letter to one of the victim’s girlfriends, Brenda Madrid. Cabrera stated  
11 that petitioner was asking Madrid to forgive him for what happened (*id.*, Reporter’s Transcript,  
12 Vol. 9 at 2059). Based on this record, strong evidence was presented at trial apart from Mateo’s  
13 testimony to support the guilty verdict. The trial court’s failure to give the instruction cannot,  
14 therefore, have resulted in prejudice to petitioner. Accordingly, petitioner’s claim is denied.

15 **4. USE OF CALJIC NO. 2.11.5**

16 Petitioner claims that his due process and confrontation rights were violated when the trial  
17 court instructed the jury with CALJIC No. 2.11.5, regarding unprosecuted accomplices. Petitioner  
18 contends that the instruction was prejudicial because it restricted the jury from considering that  
19 Mateo was facing potential prosecution if he did not testify against petitioner (Pet. at 18). The  
20 state appellate court found that though the prosecution conceded that petitioner’s claim that the  
21 trial court had erred, there was “no reasonable likelihood the jury believed that, in assessing  
22 Mateo’s credibility, it could not consider whether Mateo had pleaded guilty to accessory after the  
23 fact to avoid facing more serious [charges]” related to the case (Ans., Ex. C at 18, 20). CALJIC  
24 No. 2.11.5, as read to petitioner’s jury, is as follows:

25 There has been evidence in this case indicating that a person other than a defendant  
26 was or may have been involved in the crime for which that defendant is on trial.  
27 There may be many reasons why that person is not here on trial. Therefore, do not  
discuss or give any consideration as to why the other person is not being prosecuted  
in this trial or whether he has been or will be prosecuted. Your sole duty is to  
decide whether the People have proved the guilt of the defendant on trial.  
28

1 (Ans., Clerk's Transcript, Vol. 3 at 603). In addition to giving the disputed instruction, the trial  
2 court also instructed the jury to consider a witness's "bias, interest, or other motive" (CALJIC  
3 2.20) for testifying (Ans., Clerk's Transcript, Vol. 3 at 605).

4 At trial, Mateo's motivations for testifying and his culpability were made plain. In his  
5 testimony, Mateo admitted that he had been convicted of being an accessory, rather than of murder  
6 (*id.*, Reporter's Transcript, Vol. 8 at 1891). Police detective Sheldon Bryan, who took the stand  
7 immediately after Mateo, testified that he told Mateo that if Mateo would tell the police what he  
8 knew about the September 1st shooting, "we would evaluate [his statement], and then the district  
9 attorney's office would decide if anything at all would be done regarding his cases" (*id.* at 1919).

10 A habeas petitioner is not entitled to relief unless the instructional error "had substantial  
11 and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507  
12 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In other  
13 words, state prisoners seeking federal habeas relief may obtain plenary review of constitutional  
14 claims of trial error, but are not entitled to habeas relief unless the error resulted in "actual  
15 prejudice." *Id.* (citation omitted).

16 Under these legal principles, petitioner's claim is without merit. Simply put, the jury had  
17 no need to speculate on untried persons — the jury had been informed that Mateo already had  
18 been convicted of a crime related to this case. While the instruction may have confused the jury,  
19 its effect, based on the record, was not prejudicial, especially considering that, one, that the trial  
20 court instructed the jury that it could consider a witness's bias or interest in testifying, and, two,  
21 the strength of the evidence, apart from Mateo's testimony, supporting petitioner's guilt.  
22 Accordingly, petitioner's claim is denied.

23 Petitioner's claim that the trial court denied his right of confrontation is without merit, as  
24 the attempts at impeaching Mateo's credibility, as noted above, attest. Petitioner's claim is denied.

25 **5. USE OF CALJIC NO. 2.21.2**

26 Petitioner claims the trial court violated his right to due process by giving the jury CALJIC  
27 2.21.2, regarding rejecting testimony when part of the testimony is false. Petitioner contends that  
28 this instruction's "probability reference" permits jurors "to resolve dispositive credibility questions

1 as to impeached prosecution witnesses by a preponderance standard” (Pet. at 22). The state  
2 appellate court found no merit in petitioner’s claim because such claims regarding CALJIC 2.21.2  
3 have been rejected by the California Supreme Court (Ans., Ex. C at 20).

4 The Due Process Clause “protects the accused against conviction except upon proof  
5 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is  
6 charged.” *In re Winship*, 397 U.S. 358, 364 (1970). CALJIC 2.21.2, as read to petitioner’s jury,  
7 is:

8 A witness, who is willfully false in one material part of his or her testimony, is to be  
9 distrusted in others. You may reject the whole testimony of a witness who willfully  
has testified falsely as to a material point, unless, from all the evidence, you believe  
the probability of truth favors his or her testimony in other particulars.  
10

11 (Ans., Clerk’s Transcript, Vol. 3 at 607).

12 Under these legal principles, petitioner’s claim is without merit. Specifically, there is no  
13 evidence that the disputed instruction confused the two distinct processes of determining the guilt  
14 of a criminal defendant based on the evidence and the assessment of the credibility of a witness  
15 who may provide evidence. Due process requires only that the jury find petitioner guilty of every  
16 fact necessary to constitute the crime based on proof beyond a reasonable doubt. CALJIC 2.21.2  
17 relates to the assessment of a witness’s credibility, which is not based on a reasonable-doubt  
18 standard, nor is it constitutionally required to be. Taking the two processes together, the jury uses  
19 CALJIC 2.21.2 to determine witness credibility. If the jury finds the witness credible, it then must  
20 determine whether that witness’s testimonial evidence, along with all the other evidence presented  
21 at trial, prove a criminal defendant’s guilt beyond a reasonable doubt. Without evidence to the  
22 contrary, the Court must assume that the jury followed its instructions and kept the two processes  
23 distinct. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Accordingly, petitioner’s claim is  
24 denied.

25 **6. CUMULATIVE ERROR**

26 Petitioner claims that his due process rights were violated by the cumulative effect of the  
27 above constitutional errors (Pet. at 24).

28 In some cases, although no single trial error is sufficiently prejudicial to warrant reversal,

1 the cumulative effect of several errors may still prejudice a defendant so much that his conviction  
2 must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893–95 (9th Cir. 2003). However,  
3 where there is no single constitutional error existing, nothing can accumulate to the level of a  
4 constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

5 Petitioner's claim is without merit. Because there exists no single constitutional error,  
6 there are no errors to accumulate to the level of a constitutional violation.

7 **7. REMAND TO JUVENILE COURT**

8 Petitioner claims that the trial court's conclusion that it lacked the power to order a remand  
9 to juvenile court absent prosecutorial consent violated due process and the separation of powers  
10 doctrine (Pet. at 26).

11 Petitioner's claim fails. Petitioner has not cited any persuasive federal authority that the  
12 trial court's conclusion, which was based on its determination of state law, violates his federal  
13 constitutional rights. A reviewing federal court sits only to address violations of federal, and not  
14 state, law. *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456  
15 U.S. 107, 119 (1982); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Because petitioner has not  
16 presented a cognizable federal habeas claim, his claim is denied.

17 **8. EFFECTIVENESS OF TRIAL AND APPELLATE COUNSELS**

18 Petitioner appears to allege that his trial and appellate counsel were ineffective for failing  
19 to raise a Fifth Amendment claim at trial and on appeal (Pet. at 5). This claim appears as a  
20 parenthetical statement on the petition form, while petitioner's seven other claims are clearly  
21 announced, presented, and distinguished. Despite appearing as an aside, the Court will address  
22 this parenthetical statement as a claim. Though petitioner's claim appears to be unexhausted, the  
23 Court will deny it on the merits. See 28 U.S.C. § 2254(b)(2)

24 Petitioner alleges that his trial and appellate counsels rendered ineffective assistance when  
25 they failed to raise a claim that his Fifth Amendment rights, as they are articulated in *Miranda v.*  
26 *Arizona*, 384 U.S. 436 (1966), were violated.

27 Claims of ineffective assistance of counsel are examined under *Strickland v. Washington*,  
28 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of counsel, petitioner must

1 establish two things. First, he must establish that counsel's performance was deficient, *i.e.*, that it  
2 fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at  
3 687–68. Second, he must establish that he was prejudiced by counsel's deficient performance, *i.e.*,  
4 that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the  
5 proceeding would have been different." *Id.* at 694. A reasonable probability is a probability  
6 sufficient to undermine confidence in the outcome. *Ibid.* Where the defendant is challenging his  
7 conviction, the appropriate question is "whether there is a reasonable probability that, absent the  
8 errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. It is  
9 unnecessary for a federal court considering a habeas ineffective assistance claim to address the  
10 prejudice prong of the Strickland test if the petitioner cannot even establish incompetence under  
11 the first prong. *See Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Claims of  
12 ineffective assistance of appellate counsel are reviewed according to the *Strickland* standard.  
13 *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).

14 Petitioner's claim regarding his trial counsel is without merit. Trial counsel did raise the  
15 matter before the trial court, as trial counsel's motion in limine, a copy of which petitioner  
16 includes in his petition, makes clear. Because petitioner's claim rests on his allegation that trial  
17 counsel failed to raise the issue, his claim fails. His claim regarding his appellate counsel is also  
18 without merit. Under *Miranda*, a person subjected to custodial interrogation must be advised that  
19 he has the right to remain silent, that statements made can be used against him, and that he has the  
20 right to counsel. These warnings must precede any custodial interrogation, which occurs  
21 whenever law enforcement officers question a person after taking that person into custody or  
22 otherwise significantly deprive a person of freedom of action. *Miranda*, 384 U.S. at 444. Based  
23 on the transcript of his police interrogation, which is appended to the copy of the motion in limine,  
24 the police informed petitioner of his *Miranda* rights, and, in fact, answered his specific questions  
25 about those rights. Because there is no evidence of an underlying constitutional violation,  
26 petitioner has failed to show that appellate counsel's failure to raise the issue on appeal constituted  
27 a deficient performance. Accordingly, petitioner's claims of ineffective assistance of trial and  
28 appellate counsel are denied.

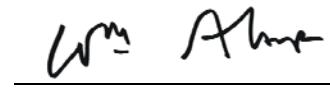
1 As to all petitioner's claims, the Court concludes that the state court's determinations were  
2 not contrary to, or unreasonable applications of, clearly established Supreme Court precedent, nor  
3 were they based on an unreasonable determination of the facts in light of the evidence presented  
4 under 28 U.S.C. 2254 (d)(1), (2). Accordingly, petitioner's claims are denied.

5 **CONCLUSION**

6 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The clerk  
7 shall enter judgment and close the file.

8 **IT IS SO ORDERED.**

9 Dated: January 14, 2009



10 WILLIAM ALSUP  
11 UNITED STATES DISTRICT JUDGE